

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BOBBY JOE LYONS,

Petitioner,

v.

STEPHEN SINCLAIR,

Respondent.

Case No. C12-2216 RSM-BAT

ORDER OF DISMISSAL

I. INTRODUCTION

This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable Brian A. Tsuchida, United States Magistrate Judge. Dkt. # 38. Petitioner has filed a “Motion for Extension of Time to File a Reply” to the R&R (Dkt. # 39); Objections to the R&R (Dkt. # 41); and a Motion for Stay and Abeyance (Dkt. # 42). Petitioner’s motion for an extension is now moot as he filed objections to the R&R, which the Court has considered. The Court has also considered Petitioner’s substantive objections to the R&R and his motion seeking to stay the petition, and finds them without merit.

II. PETITIONER’S OBJECTIONS

Petitioner raises the following four objections to the R&R: (1) the Court erred by failing to determine whether Petitioner has any remaining state court remedies for the claims that were not exhausted in state court, (2) a ruling on the merits of Petitioner’s exhausted claims is not permitted where a petition contains unexhausted claims, (3) Petitioner is entitled to an

1 evidentiary hearing regarding the issue of exhaustion, and (4) Petitioner should have had an
2 opportunity to amend the petition or to have the petition stayed.

3 **A. Objection 1**

4 Contrary to Petitioner's assertion, the Magistrate Judge expressly determined that
5 Petitioner's unexhausted claims are procedurally barred in state court under RCW 10.73.090,
6 RCW 10.73.140, and RAP 16.4. Dkt. # 38, p. 4. Further, the Magistrate Judge considered
7 whether Petitioner demonstrated either cause and prejudice or a fundamental miscarriage of
8 justice that would be sufficient to overcome the procedural default. *See Coleman v. Thompson*,
9 501 U.S. 722, 732 (1991). For each of Petitioner's unexhausted claims, the Magistrate Judge
10 determined that Petitioner fell far short of meeting this standard. *See* Dkt. # 38, pp. 4-10.

11 **B. Objection 2**

12 Ordinarily, a district court would dismiss a petition that includes claims that were not
13 exhausted in state court. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). The "mixed" petition would
14 be dismissed to allow petitioner the opportunity present the unexhausted claims to the state court
15 for review. *Id.* However, where, as here, the unexhausted claims are procedurally defaulted, and
16 where the petitioner has failed to demonstrate cause and prejudice or a fundamental miscarriage
17 of justice to overcome the procedural bar, the court is not precluded from considering the merits
18 of the exhausted claims. *See e.g., Ish v. Uttecht*, C12-6084 RBL, 2014 WL 1089554, *17 (W.D.
19 Wash. Mar. 17, 2014).

20 **C. Objection 3**

21 The Court has considered Petitioner's objection and his prior motion requesting an
22 evidentiary hearing (Dkt. # 36). The Court agrees with the Magistrate Judge's determination that
23 an evidentiary hearing is not warranted under the circumstances. Dkt. # 38, pp. 29-31.

1 **D. Objection 4**

2 As noted, Petitioner's unexhausted claims are procedurally barred. The petition presents
3 no claims that may be presented to the state court for review. Thus, there are no grounds for
4 staying the petition.

5 **III. CONCLUSION**

6 The Court, having reviewed Petitioner's 28 U.S.C. § 2254 habeas petition, the Report
7 and Recommendation of the Honorable Brian A. Tsuchida, United States Magistrate Judge,
8 Petitioner's objections and motions, and the remaining record, finds and **Orders** as follows:

- 9 1. The Report and Recommendation is **ADOPTED**;
- 10 2. Petitioner's 28 U.S.C. § 2254 habeas petition is **DISMISSED** with prejudice;
- 11 3. Petitioner's motion for evidentiary hearing, discovery, and counsel (Dkt. 36) is
12 **DENIED**;
- 13 4. Petitioner is **DENIED** issuance of a certificate of appealability;
- 14 5. Petitioner's Motion for an Extension of Time is **STRICKEN AS MOOT**;
- 15 6. Petitioner's Motion for Stay and Abeyance is **DENIED**; and
- 16 7. The Clerk shall send a copy of this Order to the parties and to Judge Tsuchida.

17 DATED this 7 day of July 2014.

18
19 

20 RICARDO S. MARTINEZ
21 UNITED STATES DISTRICT JUDGE
22
23